No. 14481
IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & CO., INC., a corporation,
Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,
Appellee.

Appeal From the District Court of the United States for The Southern District of California, Central Division.
Hon. Ernest A. Tolin, Judge.

APPELLANT'S REPLY BRIEF.

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Preliminary Statement.

In the statement of facts contained in appellant's opening brief (pp. 6-20), appellant attempted to set forth a fair summary of the evidence presented to the district court by both appellant and appellee. No attempt was made to beg the question by stating as a fact that which is in issue on this appeal. Appellee has not been so generous since its statement of facts (pp. 2-5) assumes as true those conclusions which are in dispute and which are yet to be decided by this Court.

At pages 6 and 7 of its brief appellee has attempted to discredit two small portions of appellant's "Statement of the Case" appearing at pages 3 and 17 of appellant's opening brief. Appellant is not intimidated by this attempt and in refutation invites this Court to read the Transcript of Record as cited in appellant's opening brief on said pages.

More important to this appeal, appellant, in its opening brief, placed before this Court certain basic arguments for reversal of the judgment of the district court. For the most part appellee's brief makes no attempt to meet these arguments. Where an argument is met, however, appellee seeks to confuse rather than to refute it. In order that the failure of appellee to meet or refute appellant's arguments, or the authorities cited in support thereof, may be properly brought to this Court's attention, appellant in this its reply brief will consider in turn each of its arguments and appellee's reply thereto.

ARGUMENT.

Broadly speaking appellant's arguments for reversal related to two areas: the existence of a contract and the propriety of the damages awarded appellee. Under these two general headings appellant argued the sufficiency of the evidence, the sufficiency of the findings of fact, and the inconsistent and conflicting nature of the findings of fact, the conclusions of law and the judgment.

Appellee's first response to all of these arguments is that appellant ". . . has devoted all, or substantially all, of its brief to arguing the evidence . . ." (App. Br. p. 8.)* Appellee then seeks to establish in the next four pages of its brief that which is conceded at page 22 of appellant's opening brief. In so doing appellee completely ignores the arguments of appellant that the findings of fact are insufficient and fatally inconsistent and that the conclusions of law and judgment are both conflicting and not supported by the findings of fact. Appellee's reluctance to meet these issues evidences the correctness of appellant's appeal.

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*For convenience Appellee's Opening Brief is hereinafter referred to as "App. Br."; and Appellant's Opening Brief is hereinafter referred to as "A. O. B."

I.

Appellant's first argument for reversal was that:

The Findings of Fact With Respect to the Existence of a Contract Are Insufficient, Inconsistent and Conflicting and Not Supported by the Evidence.

A. The Evidence Is Wholly Insufficient to Support the Finding That Appellant and Appellee Entered Into a Written Contract on March 6, 1952.

Pursuant to this argument, appellant showed that appellant did not consent to be bound by contract or intend to enter into an agreement on March 6, 1952 (A. O. B. pp. 24-32) and that even assuming an exchange of an offer and an acceptance, appellant and appellee did not agree upon the same thing in the same sense. (A. O. B. pp. 32-38.) This lack of mutual assent was shown by the very letters of March 6, 1952, found by the district court to constitute a valid contract and by the testimony and admitted conduct of appellee's president, Mr. Mills.

To this appellee replies in its brief at the pages hereinafter noted that these letters contain all of the essential items necessary to the formation of a contract to sell (p. 17); that a contract may be expressed or may be implied (pp. 17-18); that an agreement of sale need not be evidenced by a formal contract drawn with technical exactness (p. 18); and that these letters satisfy the statute of frauds or that in any event appellant is estopped to rely on the statute of frauds. (pp. 18-19.)

Appellee's contentions in this regard may be true but they are not pertinent to the issue raised by appellant, to wit: that there was no mutual assent between appellant and appellee sufficient to support the existence of a contract. Appellee makes no effort to meet and answer the fact that these letters [Pltf. Exs. 6 and 7] were in the one instance directed to the "Government Procurement Office"—not to appellee—and in the other instance merely

an acknowledgment of appellee's "order" which was conditioned on appellant's ". . . ability to handle the business when you (appellee) are in a position to confirm it."

Lack of mutual assent was shown by appellant in another way, for even if it be assumed that the parties intended a contract, it is clear that appellant and appellee did not agree upon the same thing in the same sense. (A. O. B. pp. 32-38.) Appellee's only effort to meet and answer this argument is contained at pages 26-27 of its brief where it is stated that Mr. Mills' understanding of the phrase "in the greige" was in complete accord with that of every witness called on behalf of appellant. This is just not so, for a careful reading of the record shows positively that *at the time the alleged contract was made,* as distinguished from the time of trial, Mr. Mills believed that the phrase "in the greige" referred to the *color* of cloth rather than to all of its natural characteristics as it comes off the loom. [Tr. I, pp. 78-79, 165-178.] Mr. Mills made this clear in his direct testimony [Tr. I, pp. 78-79] even though appellee did not see fit to bring it to the attention of this Court. Mr. Mills also made this clear when he admitted that *the fact that some of the replies received by him to his inquiries from other sources quoted on finished goods and others on greige goods meant nothing to him.* [Tr. I, pp. 182-187; Tr. II, p. 572.]

Appellant's next contention under its first argument for reversal was that:

B. The Findings of Fact Concerning the Written Contract of March 6, 1952, Are Fatally Inconsistent, Conflicting and Uncertain.

Pursuant to this argument, appellant pointed out that the findings of fact themselves—not the evidence—showed that the terms of the contract found by the trial court were not complete and certain (A. O. B. pp. 39-41) and that at

most appellant and appellee agreed to enter into negotiations and to agree upon the terms of a contract in the future. (A. O. B. pp. 42-48.) Appellant showed that the inconsistency of the findings in either of these respects justified a reversal of the judgment of the district court.

In reply to appellant's argument that the March 6th contract was incomplete and uncertain, appellee contends that a change from two widths of cloth to one after the date of the alleged contract is insignificant. (App. Br. pp. 20-23.) In support of this contention appellee cites cases purporting to hold that an agreement which gives the buyer an *election* to select the style or type of goods specified in the contract is nevertheless sufficiently definite as to be enforceable. Again, this may be the law but it is not applicable to the facts presented on this appeal since the March 6th letters show on their face that here there was never such an election considered. Furthermore, it was not merely the width of cloth that was left uncertain on March 6, 1952. As summarized at pages 29-31 and 43 of appellant's opening brief, each and every important term of the alleged contract was changed after March 6, 1952, including the quantity of cloth, the widths of cloth, the price per yard, the credit arrangements, the delivery dates, instructions on shipping, packaging and seconds, and the total purchase price of the goods. Under such circumstances, appellee's authorities are not in point.

Appellee then seeks to bolster its argument by referring to the principle that the law does not favor the destruction of contracts because of uncertainty. (App. Br. pp. 23-24.) But these authorities equally establish that the essentials of the contract must be agreed upon and be ascertainable. From the conflicting findings of fact it is at once apparent that this requisite of a valid contract has not been met.

Appellee next contends, and for the very first time, that the changes made *eight days after* March 6, 1952,

amounted to a *modification* of the March 6th contract "and hence removed whatever uncertainty might have been theretofore existent." (App. Br. p. 25.) This is truly an amazing argument. In the first place, it has always been contended by appellee [Tr. I, p. 212] that the changes of March 14, 1952, were made for the purpose of *confirming* the terms of the March 6th contract. In the second place, appellee does not explain how it is possible to modify an agreement which is uncertain and therefore not an agreement. In the third place, appellee does not explain how Plaintiff's Exhibit 8 attains the position of an agreement of modification since on its face it purports to be nothing more than a memorandum of an order which is subject to acceptance or rejection by the particular mill involved. These spurious arguments by appellee once again illustrate appellee's utter frustration at attempting to discover a theory upon which the existence of a contract might be sustained when in fact the minds of the parties had never met.

Appellee's final reply to appellant's contention that the March 6th contract is uncertain is a reference to the testimony of Mr. Mills and of Mr. Piersol to the effect that all of the terms mentioned in the alleged contract of March 6, 1952, had been discussed prior to March 6th. (App. Br. p. 26.) From this it argued that the alleged contract was definite and certain since the parties had already discussed the terms mentioned therein. This argument, however, overlooks the fact that appellant and appellee *continued to discuss* each and every term mentioned in the letters, as well as terms not previously discussed, for eight days *after* the March 6th letters were written. (A. O. B. pp. 29-31.) If the contract was complete and certain on March 6, 1952, as appellee contends, there would have been no need for these continued negotiations and discussions.

II.

The Principle of Estoppel Has No Application to the Facts Presented by This Appeal.

A. All of the Elements Constituting an Alleged Estoppel Must Be Affirmatively Alleged.

At pages 12-14 of its brief, appellee argues that appellant is estopped to deny the existence of a valid contract between appellant and appellee. Apart from the merits, this argument is not available to appellee since estoppel was in no way pleaded or relied upon by appellee at the trial of this action. It is well established that the person who seeks to rely upon an alleged estoppel must affirmatively allege all of the elements constituting the estoppel.

Silva v. Linneman, 73 Cal. App. 2d 971, 976, 167 P. 2d 794, (1946);

Fleishbein v. Western Auto S. Agency, 19 Cal. App. 2d 424, 427-428, 65 P. 2d 928 (1937);

Producers Holding Co. v. Hill, 201 Cal. 204, 256 Pac. 207 (1927);

Krupp v. Mullen, 120 Cal. App. 2d 53, 260 P. 2d 629 (1953).

Appellee argues to the contrary, citing cases purporting to hold that in a plaintiff's pleadings estoppel need not be pleaded. (App. Br. pp. 14-15.) These cases, however, are not authority for such a general rule. They stand only for the proposition that a plaintiff need not plead an estoppel in anticipation of one of defendant's defenses or where the facts underlying the estoppel are raised for the first time in defendant's answer. Such is not the case at bar, for appellee was the party who had the opportunity to plead the alleged estoppel upon which its cause of action depended. Consequently, it was incumbent upon appellee to plead the estoppel with fullness and particularity.

Appellee then argues that its Complaint sufficiently pleads all of the requisite elements of an estoppel. (App.

Br. p. 14.) The answer to this, of course, lies in the allegations of the Complaint. [Tr. I, pp. 3-16.] It is entitled: "Complaint for Damages for Breach of Contract." Even a cursory reading of this Complaint shows that it is completely devoid of any allegation of an estoppel. Moreover, in his opening statement counsel for appellee unequivocally stated that the action was to recover damages for breach of contract. [Tr. I, p. 44.] This was also appellant's understanding of appellee's alleged cause of action as indicated by its counsel at the time of trial. [Tr. I, p. 67.] In fact, the trial judge asked appellant's counsel before the first witness was called whether any principle of estoppel was involved. Appellant's counsel replied in part:

> "I find them unpleaded . . . As we understand it from the pleading and presentation of counsel, this action is based upon a written agreement of March 6, 1952. If we are mistaken with respect to that, why, we would be happy to have it clarified both in the pleading and here orally." [Tr. I, p. 67.]

In response, appellee made no attempt to indicate either to the court or to appellant that an estoppel was part of its cause of action.

Appellee then contends that appellant has waived the defect in the pleading because the record ". . . is devoid of a valid objection by Appellant to the introduction of testimony by the Appellee in support of liability predicated upon the theory of estoppel." (App. Br. p. 15.) Appellee's conclusion, however, does not follow from its premise for at no time did appellant have the opportunity to interpose such an objection. Appellee's testimony in this regard was relevant to the issue of the formation and existence of a contract, its alleged breach and appellee's claimed damages. In view of appellee's statement of the nature of appellee's cause of action, appellant submits that no objection on its part was required or even appropriate.

B. The Findings of Fact and Evidence Are Insufficient to Establish an Estoppel.

Assuming that appellee has properly pleaded an estoppel, the findings of fact and the evidence are insufficient to establish appellant's liability on that theory. In substance appellee argues that appellant represented to appellee that the letters of March 6, 1952, constituted a contract and that appellee reasonably relied upon such representation to his injury. Appellee concludes that appellant is therefore estopped to deny the fact that a contract did exist. (App. Br. pp. 12-14.)

Appellee's specific argument on the facts of the case, however, confuses the issue. It is difficult to determine whether appellee is arguing that appellant is estopped to deny the existence of a contract or whether appellee is arguing that the contract which was otherwise established provided for the sale of greige goods which met the required military specifications. In either event, appellee's premises are not supported by the evidence or the law and therefore appellee's conclusions must fail.

Appellee first claims that Exhibit 6 was intended to induce action and conduct on the part of *appellee*. This is palpably untrue as shown by its very terms, for the last sentence expressly states, "This memo is written with the idea of submitting (it) to the Government Procurement Office." Exhibit 6 was not directed to appellee and therefore could not have been intended to induce action on the part of appellee.

> *People v. Main,* 75 Cal. App. 471, 476, 242 Pac. 1078 (1925).

On the other hand, appellee would ignore Exhibit 7 which *was* directed to appellee and which made it clear that there was not a contract existent between appellant and appellee. The second paragraph of this letter shows that it is nothing more than an acknowledgment of appellee's "or-

der" for cloth which was being relayed to appellant's home office in New York. Moreover, the closing portion of the letter shows that the minds of the parties had not met, for it provides, ". . . and, of course, the whole thing is predicated on our (appellant's) ability to handle the business when you are in a position to confirm it."

It thus appears not only that no representation was made to appellee that a contract existed but also that appellee knew that in fact no contract existed. Under such circumstances appellee may not assert an estoppel since appellee cannot show that it relied upon the March 6th letters. [Pltf. Exs. 6 and 7.] Reliance is a necessary element to an estoppel, and the reliance must be reasonable. It cannot be reasonable, however, where the full facts are known to the person asserting the estoppel.

Development Co. v. Seaboard D. C. Corp., 1 Cal. 2d 121, 128, 34 P. 2d 139 (1934);

American Nat. Bk. v. A. G. Sommerville, 191 Cal. 364, 372-373, 216 Pac. 376 (1923);

Young v. Bank of California, 88 Cal. App. 2d 184, 198 P. 2d 543 (1948);

Estate of Jackson, 112 Cal. App. 2d 16, 18, 245 P. 2d 684 (1952).

III.

Appellant's second argument for reversal was that:

The Judgment, Conclusions of Law and Findings of Fact With Respect to Appellee's Damage Are Insufficient, Conflicting and Not Supported by the Evidence.

A. The Trial Court Has Failed to Find That There Was No Available Market for the Goods in Question.

Pursuant to this argument, appellant showed that the measure of damages contended for by appellee had no application unless it was first found by the trial court that there was not an available market for the goods in question. Without such finding appellant pointed out that appellee could not recover either its alleged loss of profits or damages allegedly due from appellee to the United States. The necessity of such a finding is one of law and its absence constitutes reversible error. (A. O. B. pp. 51-54.)

To this appellee replies that appellant has misconstrued the theory upon which appellee seeks a recovery for loss of profits—that such recovery is not based upon the difference between the contract price and the market value of certain goods. (App. Br. pp. 43-44.)

But appellant has not misconstrued appellee's theory! Appellant's point is that appellee's theory for recovery *cannot, as a matter of law, apply* unless and until it is found as a fact that there is no available market for the goods in question. Such is the precise holding of the court in *Grupe v. Glick,* 26 Cal. 2d 680, 160 P. 2d 832 (1945), as set forth in appellant's opening brief at pages 51-53. Appellee has erroneously cited the *Grupe* case to the con-

trary. (App. Br. p. 44.) At the pages referred to by appellee, the court discusses the measure of damage, applicable where the *goods have already been delivered* to the buyer which is clearly not the case presented on this appeal.

Appellee also cites a portion of California Civil Code Section 3300 in support of its position that the availability or non-availability of these goods in the open market is immaterial. In so doing appellee omitted the following words appearing in that code section: ". . . except where otherwise expressly provided by this code . . ." What is significant is that the Civil Code does "otherwise provide" for the measure of damages applicable to a breach of contract for the sale of goods. (Civ. Code, Sec. 1787(3).) Again, appellee's authorities do not support its position.

At pages 39-41 of its brief, appellee cites several cases for the general proposition that appellee is entitled to recover loss of profits as an element of its damage. Of these, *Noble v. Tweedy* and *Hacker etc. Co. v. Chapman Co.* do not even concern contracts for the sales of goods. Appellee also relies upon *Patty v. Berryman,* 95 Cal. App. 2d 159 (1949) and *Western Industries Co. v. Mason Malt Whiskey,* 56 Cal. App. 355 (1922). But again, these cases do not support appellee's position. At pages 171-172 of the *Berryman* case and at page 364 of the *Western Industries* case, the appellate court explicitly states that it had been found by the trial court that there was no available market for the goods in question. Upon such finding it was then proper to allow loss of profits as an element of damage.

> *Bercut v. Park, Benziger & Co.,* 150 F. 2d 731 (9th Cir., 1945).

The absence of such a finding or any evidence to support such a finding, is one of the grounds appellant believes requires reversal of the trial court's judgment in the case at bar.

Appellant also argued that:

B. The Findings in Regard to Loss of Profit Are Insufficient, Conflicting and Not Supported by the Evidence.

1. Loss of Profits Claimed by Appellee Are Too Remote, Speculative and Uncertain to Be Recovered.

Here appellant pointed out that appellee was not entitled to recover its alleged loss of profits for another reason since it was a new enterprise engaging in a new industry. In this connection it is well established as a matter of law that where the company seeking to recover damages is a new venture without any previous experience in the industry, loss of profits cannot be included as a part of the damages recoverable because there is no base upon which to prove what its profits would have been. (A. O. B. pp. 55-62.)

Appellee made no reply to this argument.

2. The Findings of Fact With Respect to Gross Receipts Are Inconsistent and Not Supported by the Evidence.

Pursuant to this argument, appellant pointed out that the district court's calculation of appellee's prospective profit was, as shown by the uncontradicted evidence and the findings themselves, excessive in the amount of $1,386.78—assuming, of course, that loss of profit was recoverable at all. (A. O. B. pp. 63-65.)

Appellee made no reply to this argument.

Appellant next argued that:

C. The Findings, Conclusions and Judgment With Respect to the Money Claimed by the United States Are Insufficient, Conflicting and Not Supported by the Evidence.

Under this heading, appellant set forth four separate arguments any one of which requires a reversal of the district court's judgment. These arguments are:

1. The conclusions of law and the judgment with respect to the money claimed by the United States are insufficient, inconsistent and contingent. (A. O. B. pp. 65-68.)
2. Damages for which appellee might be liable to the United States were not within the contemplation of the parties. (A. O. B. pp. 68-71.)
3. The fact of appellee's liability to the United States has not been established. (A. O. B. pp. 71-74.)
4. The amount of appellee's alleged liability to the United States has not been established with any reasonable certainty. (A. O. B. pp. 74-76.)

With one exception, appellee made no reply to any of these arguments. Appellee's sole reply appears at page 43 of its brief where it is stated that appellant concedes at page 72 of its opening brief that the case of *House Grain Co. v. Finerman & Sons,* 116 Cal. App. 2d 485, 253 P. 2d 1034 (1953), is ample authority to support the award of $4,100.66 to the United States Government. This is ridiculous, as a reading of appellant's opening brief will show.

Conclusion.

In its opening brief appellant advanced several arguments for reversal, any one of which standing alone represents sufficient ground for reversal of the judgment of the district court in the within action. These arguments related to two general areas: the existence of a contract and the propriety of the damages awarded appellee. For the most part appellee's brief neither meets nor answers these arguments of appellant, but is instead limited to misstatement and the irrelevant. In this connection, appellee, at pages 29-38 of its brief, deals with the question of duty to mitigate damages and the question of the authority of Mr. Piersol to act for appellant. While appellant does not concede that appellee is correct in these particulars, appellant did not feel justified in extending its brief to include an appeal on these issues. On the other hand, appellant did present on this appeal several arguments relating to the trial court's incorrect measure of damages as applied to this case. To these arguments appellee makes no reply whatsoever. Such absence of answer is no reflection of a lack of time or effort in search therefor but is indeed a full reflection of the weakness of the position adopted by appellee.

Appellant's arguments for reversal, as set forth in detail in its opening brief, stand unimpeached, and for the most part unchallenged. Accordingly, appellant respectfully urges the Court to reverse the judgment of the district court.

Dated: January 27, 1955.

Respectfully submitted,

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